ORIGINAL with proof of service

No. 97-371

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

Petitioners,

—v.—

KAREN FINLEY, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND SUPPLEMENTAL BRIEF OF RESPONDENTS

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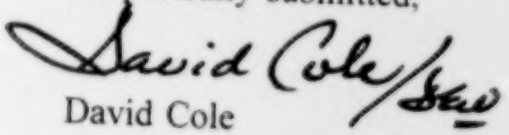
RESPONDENTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondents respectfully move for leave to file the attached supplemental brief to address an issue that this Court raised *sua sponte* at oral argument in this matter: whether plaintiffs have standing to sue. The government challenged plaintiffs' standing in the district court, but when the district court ruled that plaintiffs had standing, Pet.App. 70a-74a, the government did not dispute that conclusion in its appeal to the court of appeals, its petition for rehearing, its petition for *certiorari*, or its brief on the merits in this Court. As a result, the Court has not had the benefit of any briefing on

this subject, a subject in which several Justices expressed interest at argument. Moreover, there seemed to be some confusion at the argument regarding whether plaintiffs had been awarded or denied grants under the "decency" regime.

Accordingly, respondents respectfully move for leave to file the attached supplemental brief, which addresses only the issue of plaintiffs' standing to sue.

Respectfully submitted,



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Dated: April 9, 1998

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ARGUMENT

Respondents submit this supplemental brief to address an issue that this Court raised *sua sponte* at oral argument in this matter, namely, whether plaintiffs have standing to sue. That issue was not addressed in any of the parties' briefs because the government elected not to take issue with the district court's conclusion that plaintiffs had standing to sue. Standing is a constitutional requirement, and therefore the government's failure to challenge standing does not mean that the issue is waived. But because the government did not dispute standing, this Court has not had the opportunity to consider the parties' views on the matter in writing.

Respondents' standing is well-established by a line of cases holding that plaintiffs whose speech rights are affected by a statute may challenge the statute on its face even before it is actually applied to them.[1] The reason for this rule is that where a statute on its face threatens First Amendment rights, any delay in judicial resolution of its constitutionality risks the loss of First Amendment freedoms in the meantime. *City of Lakewood v. Plain Dealer Publishing Co.*,

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[1] *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (facial challenge permissible when a statute "vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad"); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988); *Eu v. San Francisco County Cent. Comm.*, 826 F.2d 814, 822 (9th Cir. 1987)(granting pre-enforcement standing to challenge election law); *aff'd*, 489 U.S. 214 (1989); *Ozonoff v. Berzak*, 744 F.2d 224, 227-30 (1st Cir. 1984)(Breyer, J.)(granting standing to doctor to challenge criteria for security clearances for a job with the World Health Organization without requiring doctor to apply for and be denied the security clearance).

486 U.S. at 770 n.11. A First Amendment facial challenge by its nature is addressed to the overall risk of the suppression of ideas imposed by the challenged law. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 197 (1984); *New York State Club Association v. City of New York*, 487 U.S. 1, 11 (1988).

Respondents are four performance artists and the National Association of Artists' Organizations (NAAO), a national association of artists and arts organizations, suing on its own behalf and on behalf of its approximately 600 members. Respondents brought this facial challenge because as individuals and institutions that had sought NEA funding in the past and intended to seek NEA funding in the future, they were chilled in their freedom of expression by the imposition of the "decency and respect" clause on the NEA application review process. The chill was immediate, because as prospective applicants for funding, they had to guess whether their applications, and indeed the work they were currently engaged in, might undermine their chances for funding if an NEA official considered it either "indecent" or "disrespectful" of the American public's "beliefs and values." J.A. 21-27 (Declaration of Charlotte Murphy, Executive Director of National Association of Artists' Organizations).[2]

The chill took various forms for respondents and NAAO members, depending upon where they stood in relation to the application process. Potential applicants were chilled in the art they created even with their own funds, for

[2] In addition to NAAO's standing to sue on behalf of its members, as described herein, the district court properly recognized that NAAO also has standing to sue in its own behalf. Pet.App. 73a.

fear that "indecent" or "disrespectful" work would be considered adversely once they applied for funding. J.A. 23-25 (Murphy Dec.); C.A. E.R. 43, 50 (Declarations of Holly Hughes, Tim Miller). Those who applied for funding were "chilled in their applications and in the scope of their projects by uncertainty about what the standard means or how to comply with it." J.A. 24 (Murphy Dec.). Others had received NEA funding, but were chilled in what they created with that funding, for fear that their projects would fail to comply with the standard. Pet.App. 70a-71a and n.15. And still others were deterred even from applying for NEA funding as long as the "decency and respect" criteria were in effect. C.A. E.R. 31-40 (Declarations of Karen Finley, John Fleck).

In *City of Lakewood*, 486 U.S. 750, this Court held that the Plain Dealer could challenge on its face a municipal ordinance governing the allocation of subsidies to speech -- access to public property for newsracks -- even though the Plain Dealer had never applied for a permit. The Court held that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Id.* at 755-56. This rule is necessary to avoid "two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action." *Id.* at 759. In such circumstances, "waiting for an alleged abuse before considering a facial challenge would achieve nothing except to allow the law to exist temporarily in a limbo of uncertainty and to risk

censorship of free expression in the meantime." *Id.* at 770 n.11.[3]

City of Lakewood controls here. There, as here, the government was allocating optional subsidies to speech: just as the government has no obligation to subsidize artists, it has no obligation to subsidize newspapers by allowing newsracks on its property. There, as here, the law gave a government official "unbridled discretion" concerning whom to subsidize. "General standards of decency and respect for the diverse beliefs and values of the American public" specifies no standard of conduct at all. Pet.App. 17a-18a. Indeed, defendants conceded that the statute is "indeterminate" and offers "no way to predict" how it will be implemented. NEA C.A. Br. 31, 39. Thus, the statute accords NEA officials the same unbridled discretion as the mayor had in *City of Lakewood*. And just as the Court in *City of Lakewood* rejected the mayor's claim that he would "act in good faith and adhere to standards absent from the statute's face," 486 U.S. at 770, so here the Court should reject the NEA's (considerably more ambiguous) promise to act in good faith.

In *City of Lakewood*, the Court recognized that the chill caused by such unbridled discretion over allocating benefits to speech "can be alleviated *only through a facial challenge*." *Id.* at 757 (emphasis added). That is even more true here. No one will have better standing than the respondents currently before the Court. The NEA implemented the statute in such a way as to make "as applied" challenges literally impossible, by hiding the ball regarding

[3] *See also Virginia v. American Booksellers Ass'n*, 484 U.S. at 393 (noting danger of self-censorship in authorizing pre-enforcement challenge to statute regulating speech).

the consideration of decency and respect. While NEA panelists were instructed to bring their own standards of decency to the table in judging applications, they were not instructed to make a "separate determination as to whether an application is decent or respectful," but rather to fold that determination into their artistic merit judgment. J.A. 80-81 (Declaration of Randolph McAusland). Applicants therefore had no way of knowing whether their applications had been denied based on "decency or respect," and thus, could not have brought an "as applied" challenge.[4]

[4] An "as applied" challenge would be even more futile were the NEA to implement the statute merely by considering "decency and respect" in selecting diverse panels. The chill created by the criteria would remain -- just as scholars would be chilled if the NEH were to announce that it was taking "political correctness" into account in selecting its panel members -- even though panel decisions would not reflect that applications were denied for "decency and respect" reasons. *Cf. Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 1983)(granting students standing to challenge provision in textbook selection statute barring books critical of founders, where provision was just one of many selection criteria, and students could never show that books were denied under the challenged provision because defendant gave no reasons for denials).

CONCLUSION

For all of these reasons and the reasons stated by the district court, respondents plainly have standing to challenge the "decency and respect" clause on its face. The judgment below should therefore be affirmed.

Respectfully submitted,

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